Supreme Court, U.S.
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No. 91-1549

In The

Supreme Court of the United States

October Term, 1991

NEW YORK STATE DEPARTMENT OF HEALTH,

Petitioner,

-against-

JOANNA ANDRULONIS, ET AL.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF JOANNA ANDRULONIS, INDIVIDUALLY AND AS CONSERVATOR OF THE PROPERTY OF JEROME ANDRULONIS, AS RESPONDENT IN OPPOSITION TO THE PETITION

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18

TABLE OF CONTENTS

Page

Opinions 1

Jurisdiction 1

Statement of the Case 1

Argument 3

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES

Andrulonis v. U.S., 724 F.Supp. 1421 (N.D.N.Y. 1989) 3, 5, 10, 12

In re Joint Eastern and Southern Districts Asbestos Litigation, 891 F.2d at 37 (2d Cir. 1989) 10

Ayala v. United States, 771 F.Supp. 1097 (D. Colo. 1991) 11

Berkovitz v. United States, 486 U.S. 531 (1988) .. 7, 10, 12

Caban v. United States, 671 F.2d at 1233 (2d Cir. 1991) 9

Dickerson v. United States, 875 F.2d 1577 (11th Cir. 1989) 12

Fazi v. U.S., 935 F.2d 535 (2d Cir. 1991) 8, 9

Federal Deposit Insurance Corporation v. Stanley, 770 F.Supp. 1281 (N.D.Ind. 1991) 11

Indian Towing Co. v. United States, 350 U.S. 61 (1955) 6, 10

Industria Pacificadora, S.A. v. United States, 763 F.Supp. 1154 (D.D.C.1991) 11

N.Y.S. Dept. of Health v. Andrulonis, 112 S.Ct. 39 (1991) 1, 7

Phillips v. United States, 1992 U.S. App. LEXIS 5448 (11th Cir., March 30, 1992) 9

Richardson v. United States, 943 F.2d 1107 (9th Cir. 1991) 12

Routh v. United States, 941 F.2d 853 (9th Cir. 1991) ... 7, 8

TABLE OF AUTHORITIES – Continued

Page

Tracor/MBA, Inc. v. United States of America, 933 F.2d 663 (8th Cir. 1991) 6

United States Fidelity and Guar. Co. v. United States, 837 F.2d 116 (3d Cir. 1988) 10

United States v. Berk & Berk, 767 F.Supp. 593 (D.N.J. 1991) 11

United States v. Gaubert, 111 S.Ct. 1267 (1991) ... *passim*

United States v. S.A. Empresa de Viaco Aerea Rio Grandnse (Varig Airlines), 467 U.S. at 813 4

STATUTES

28 U.S.C. 1254(1) 1

OPINIONS BELOW

The opinion of the Court of Appeals on Remand ("Andrulonis II") (App, A406-A415) is reported at 952 F.2d 652 (1991).

This Court's memorandum decision (App, A405), which granted NYSDOH's earlier petition for certiorari and vacated and remanded for reconsideration in light of *United States v. Gaubert*, 111 S.Ct. 1267, (1991), is reported at *N.Y.S. Dept. of Health v. Andrulonis*, 112 S.Ct. 39 (1991).

The original opinion of the Court of Appeals ("Andrulonis I") (App, A1-A45) is reported at 924 F.2d 1210 (1991).

The opinion of the District Court (App, A46-A389) is reported at 724 F.Supp. 1421 (N.D.N.Y. 1989). An earlier opinion of the District Court (App, A390-A398) is reported at 593 F.Supp. 1336 (N.D.N.Y. 1984).

JURISDICTION

The judgment of the Court of Appeals (App, A406-A415) was entered on February 14, 1992. The petition for a writ of certiorari was filed on March 26, 1992 and received by Respondent on March 26, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Although it would serve little purpose to repeat the lengthy factual recitations contained in the briefs to the

Court of Appeals or the original briefs to this Court, it should be emphasized that the facts in this case are not at all in issue; they have been found to be facts by the District Court. Petitioners' description of the facts, with citations to the record, cannot alter the findings of the District Court, which can be summarized as follows:

> In March, 1977, Dr. George Baer arguably was the most knowledgeable rabies expert in the United States . . . Baer knew that the rabies virus can be transmitted through exposure to aerosols containing the virus, and that airborne rabies virus probably infected animals, including humans, through the olfactory nerves in the nasal epithelium . . . the evidence at trial convincingly demonstrated that Baer's *actual* knowledge was far superior to that of anyone employed in the rabies laboratory at Griffin . . . Baer became aware of the fact that the Uni-Glatt machine, which he knew was not airtight, was not being operated within a laminar flow containment hood or other physical containment system. Baer testified that he knew before the virus was introduced into the Uni-Glatt that the machine would create an aerosol containing that virus. The discovery of these facts should have alerted him to the risk that those working near the Uni-Glatt machine would be exposed to a heavy dose of potentially deadly live rabies viral particles, and that those workers were not assured of protection against the rabies disease by any vaccination regimen available in March, 1977 . . . Baer's own testimony indicates that he was aware that safe laboratory practice required the containment of aerosols . . . The court also finds that notwithstanding his testimony to the contrary, Baer knew the Uni-Glatt machine was

> not airtight, and that he knew this before the ERA-BHK/21 virus strain was introduced into the machine on March 29 . . . On the whole, Dr. Baer's testimony at trial lacked credibility. His demeanor was generally poor, and many of his statements concerning rabies virus strains in general and the ERA-derived strains in particular were misleading or disingenuous. His testimony concerning the March 29 experiment was particularly implausible. For instance, Baer stated that he did not see any reddish dust escape from the Uni-Glatt machine during the third phase of the coating run conducted March 29, 1977. This is unlikely given subsequent tests performed on the machine indicating that leakage from the machine was substantial. Indeed, in late April or early May 1977, Baer told Dr. Fred Clark of the Wistar Institute in Philadelphia that the Uni-Glatt machine "leaked like Hell," with nonpareils "popping" out of the machine and into the laboratory environment . . . Baer knew the machine leaked and that it was not being operated in a proper containment system before Andrulonis experienced any aerosol exposure to the virus strain Baer had supplied . . . Baer's failure to give any additional warning was a breach of his duty to Andrulonis.

Andrulonis v. U.S., 724 F.Supp. 1421, 1488-1491 (N.D.N.Y. 1989).

ARGUMENT

For the second time in ten months, Petitioners ask this Court to grant a writ of certiorari. In support of this

request, Petitioners make two arguments. First, that they disagree with the Second Circuit's interpretation of *United States v. Gaubert*, 111 S.Ct. 1267 (1991), and second, that the Second Circuit's decision on remand is in conflict with "the overwhelming consensus of decisions outside the Second Circuit . . . " The latter argument is particularly curious. In their last application to this Court, Petitioners argued that certiorari should be granted because of the conflicts among the various circuits, which conflicts seem to have miraculously melded into a uniformity of opinion since this Court's remand in October of 1991.

The Second Circuit's decision, on remand, provided a meticulous analysis of its earlier decision in light of *Gaubert*. Petitioners contend that the Second Circuit "offered no guidance to distinguish mere negligence from conduct outside the scope of the exception." In fact, the Court borrowed this Court's footnote in *Gaubert* precisely for the purpose of distinguishing mere negligence from conduct outside the scope of the exception. That effort was apparently recognized by Petitioners, who go on to express their dismay and astonishment at the Second Circuit's equating a high level official, such as Dr. Baer, with a low level employee, like a government chauffeur. In so doing, Petitioners show their own unfamiliarity with one of the basic tenets of the discretionary function exception as enunciated by this Court. "It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *United States v. S.A. Empresa de Viaco Aerea Rio Grandnse (Varig Airlines)*, 467 U.S. at 813. See also *Gaubert*, 111 S.Ct. at 1275.

The decision in *Gaubert* was entered upon a motion to dismiss and, consequently, lacked the explicit findings of fact and thoroughly developed record available to the court in *Andrulonis v. U.S.*, 924 F.2d 1210. In addition, the decisions of the federal employees in *Gaubert* were part of a large and extensive scheme and, as such, were exactly the types of decisions Congress intended to insulate from challenge by the enactment of the discretionary function exception. In *Andrulonis*, not only was there was no statutory or regulatory scheme, there was no formal program, as established by the testimony of the government's own witness, Dr. Walter Dowdle. He stated that "CDC has never really had a program, as such. It has been a research interest and it has been a fairly low level research interest . . . " (J. App. 2213). There is *no* record evidence of any social, political, or economic policy considerations made in pursuit of establishing any "program for enteric research" by Health and Human Services, by CDC, by Dr. Baer *or anyone in the government's employ*, either generally, concerning the immunization of wildlife through the enteric route, or specifically by the provisions of the manipulated rabies virus to states. Therefore, Dr. Baers' failure to warn Andrulonis of the hazards of the procedure he witnessed in light of the equipment used and/or his choice not to halt the procedure could not be construed as in furtherance of any policy. It is entirely implausible that one *could* weigh public policy when failing to warn a human being that his exposure to an airborne rabies virus carried with it a terrible risk of death or permanent and substantial disability. In other words, there is no basis *in the record* for alleging that Baer's decision was "susceptible of policy analysis."

In *Gaubert* 111 S.Ct. 1267, this Court clarified its decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), in connection with the difference between "policy decisions" and "operational actions."

> *Gaubert* specifically rejected the "operational" distinction that Tracor tries to make here. *Id.* The court emphasized that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function applies in a given case." *Id.* (quoting *Varig Airlines*, 467 U.S. at 813). The court noted that it made the "operational" distinction in *Dalehite* only to describe the level at which the challenged conduct occurred, and did not suggest "that decisions made at an operational level could not also be based on policy." *Gaubert*, 111 S.Ct. at 1275.

Tracor/MBA, Inc. v. United States of America, 933 F.2d 663, 667 (8th Cir. 1991).

"*Gaubert* further instructs that even if the challenged conduct involves an element of judgment, the discretionary function applies only if the judgment 'is of the kind that the discretionary function exception was designed to shield.' *Id.* The exception was designed to "prevent judicial second-guessing" of *legislative and administrative decisions grounded in social, economic, and political policy . . . Tracor/MBA Inc. v. United States of America*, 933 F.2d 663, 666 (8th Cir. 1991) (emphasis added).

In explaining its decision in *Indian Towing*, the court in *Gaubert* at 1275 stated: "the United States was held liable, not because the negligence occurred at the operational level but because making sure the light was operational 'did not

involve any permissible exercise of policy judgment.' *Berkovitz, supra,* at 538, n.3, 108 S.Ct. at 159, n.3."

Likewise in *Andrulonis,* Baer's failure to warn "did not involve any permissible exercise of policy judgment." Note 7 of *Gaubert* made it crystal clear that not all discretionary actions are within the exception.

> There are obviously discretionary acts performed by a government agent that are within the scope of this employment but not within the discretionary functions exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.

Id. at 1275.

In *Routh v. United States,* 941 F.2d 853 (9th Cir. 1991), decided August 6, 1991, the Ninth Circuit examined the discretionary function exception in light of *Gaubert.* In *Routh,* the United States contracted with Coastal, Inc. to perform a road clearing project in Alaska. The plaintiff Routh was operating a backhoe for Coastal. The backhoe did not have a falling object protection system (FOPS), and Routh was injured when a tree with which he was working fell onto the backhoe. In *Routh,* the United States argued that the contract in question gives the contracting officer the ability to stop work unless corrective action is promptly taken, and that the clause deliberately delegated an element of judgment to the contracting officer who, consequently, was protected by the discretionary function exception.

> This argument leads to consideration of the second step in the analysis: to determine whether that judgment is of the kind that the discretionary function exception was designed to shield. To be

> shielded, the judgment must be grounded in social, economic and political policy. *Kennewick*, 880 F.2d at 1025.

Routh v. United States, 941 F.2d 853.

The United States contended that the contracting officer had to balance the policy objectives of promoting workplace safety against practical considerations, must notably, the disruptive impact a stop-work order would have on government operations. *Id.* at 856.

The court then reviews the decision in *Kennewick*, 880 F.2d 1018 and concludes: "similarly, in this case the contracting officer's decision whether or not a given situation created a safety hazard in violation of the safety provisions of the contract was not a public policy decision. The government's argument that the contracting officer must weigh the effects of shutting the job down versus the benefits of the safety measure is not convincing. The government's position, carried to its logical extreme, would allow the undercutting of a policy decision to require a safe workplace by purely economic considerations not supported in the record." *Routh v. United States*, 941 F.2d at 856. The court concluded, "while we have held that issuance of a stop-work order is discretionary (see Part IIIA), we conclude that the contracting officer's on-site decisions here were not of the nature and quality that Congress intended to shield from tort liability. *See, Kennewick*, 880 F.2d at 1031." *Routh v. United States*, 941 F.2d at 857.

In *Fazi v. U.S.*, 935 F.2d 535 (2d Cir. 1991), the Second Circuit examined the ruling in *Gaubert* and applied the

discretionary function exception where the alleged negligent act was the failure of the United States Postal Service to designate blank traveler's checks as negotiable instruments, thereby triggering the "special handling" which might have prevented the abduction of Mr. Fazi. The Court said:

> But a decision to treat blank traveler's checks like negotiable or bearer instruments was not required by the Manual and any such decision would be based on a balancing of economic and policy factors. A decision resulting from such a balancing cannot be a basis for suit under the FTCA. See generally *Caban v. United States*, 671 F.2d at 1233.

Fazi v. U.S., 935 F.2d 535.

In *Phillips v. United States*, 1992 U.S. App. LEXIS 5448 (11th Cir., March 30, 1992), the Eleventh Circuit examined *Gaubert*, 111 S.Ct. 1267, and stated:

> The need for expedition versus the need for safety arises several times a day for many federal employees. Nevertheless, this does not mean that a federal employee's every choice is a policy judgment shielded from liability through the operation of the discretionary function exception. *Id.* at *7.

In the instant case, there was never any showing that the failure to warn was, or ever could have been, a decision based on a balancing of economic, social or political policy factors. The Government produced no notes of policy meetings, no reports, no memoranda, no affidavits, no depositions, no testimony, not one iota of information on how, who, or why the failure to warn

should or could have been based on a balancing of economic, social or political policy. As in *Routh*, Dr. Baer's on site decision was not of the nature and quality that Congress intended to shield from tort liability.

In *Gaubert*, the Fifth Circuit incorrectly interpreted *Berkovitz's* reference to *Indian Towing* as "perpetuating a nonexistent dichotomy between discretionary functions and operational activities". *U.S. v. Gaubert*, 111 S.Ct. at 1275 (1991). In the instant case, the Second Circuit made no such error. It correctly analyzed *Indian Towing* in light of *Varig* and concluded "in short, the key inquiry is whether the decisions were necessarily susceptible to policy analysis. *Asbestos Litigation*, 891 F.2d at 37; *United States Fidelity and Guar. Co. v. United States*, 837 F.2d 116, 121 (3d Cir. 1988), cert. denied, 487 U.S. 1235, 108 S.Ct. 2902, 101 L.Ed.2d 935 (1988)." *Andrulonis v. U.S.*, 924 F.2d 1210 (2nd Cir. 1991) at 1219. This court went on to state,

> the situation simply did not lend itself to policy balancing, not (sic) is there any indication that Dr. Baer considered the policy implications or the pros and cons of allowing the experiment to proceed. Once he became aware of the risks, Dr. Baer was obligated to give warning. His is precisely the type of negligent omission to which Congress waived the government sovereign immunity in order to provide redress to citizens for the torts of government actors.

Andrulonis v. U.S., 924 F.2d at 1219.

Finally, the Second Circuit concluded its original analysis by stating that

> the District Court, however, was able to penetrate the complex facts of this case and determine that Jerome Andrulonis' illness resulted, at least in part, from Dr. Baer's failure to warn of the potentially disastrous consequences of the March 29th experiment he was observing. This was a nondiscretionary negligent omission that did not implicate any balancing of policy factors.

In *Gaubert*, the Court expanded upon its discussion in *Berkovitz v. United States*, 486 U.S. 531 and stated that the existence of regulations creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulation. *Gaubert*, 111 S.Ct. at 1274. Factually, *Andrulonis*, differs dramatically from *Gaubert* and as well from *Ayala v. United States*, 771 F. Supp. 1097 (D. Colo. 1991); *Federal Deposit Insurance Corporation v. Stanley*, 770 F. Supp. 1281 (N.D.Ind. 1991); *Industria Pacificadora, S.A. v. United States*, 763 F. Supp. 1154 (D.D.C. 1991); *United States v. Berk & Berk*, 767 F. Supp. 593 (D.N.J. 1991). In opposition to the regulatory schemes present in these cases, Andrulonis takes place in the relationship described by the deputy director of CDC, Dr. Walter Dowdle, on direct examination by the government:

> Q. Does CDC regulate the activities of the state health laboratories?
>
> A. Regulate – I'm, sorry.
>
> Q. What degree of control does CDC have over state health laboratory activities?

A. CDC has no control. It's largely a collegial relationship, no formal control.

J. App. 2170.

In *Andrulonis* there was no regulatory scheme described by the government. There was only a general assertion that CDC was required to cooperate with state laboratories. The regulatory framework which exists in the above cited cases is absent in *Andrulonis*.

"In addition, a defendant claiming the exemption must show that the disputed act was in pursuit of agency objectives." *Richardson v. United States*, 943 F.2d 1107 (9th Cir. 1991). In *Andrulonis*, the record is clear that the negligent act (i.e. Baer's failure to warn on March 29th) was not in pursuit of any agency objectives. Indeed, the government's own witness, Dr. Walter Dowdle, testified that, according to CDC practice and policy, Dr. Baer should have intervened and stopped the experiment. (J. App. 2219). This conclusion was concurred in by CDC's own safety officer, and the government offered no proof at trial that Dr. Baer had any discretion to act otherwise. In fact, it was respectfully pointed out to the Court below that not only were the actions of Dr. Baer not "susceptible to policy analysis," it was unnecessary for the court to even address the second part of the *Berkovitz* test, since the uncontroverted testimony of the government's own witnesses and the government exhibits evidenced that CDC's own policies "specifically prescribed the course of action for (Dr. Baer) to follow" in that Baer "had no discretion to deviate from (a) mandated procedure." *Berkovitz* at 546; *Dickerson v. United States*, 875 F.2d 1577, 1581 (11th Cir. 1989).

In order for Dr. Baer's negligent failure to warn to be shielded by the discretionary function exception, this Court would have to go well beyond *Gaubert*. The action for which Baer was actually found negligent is neither quantitatively nor qualitatively different than if Baer, on the way to the airport to fly to Albany, had decided to run a stop light, in order to make his plane. In that event, it is crystal clear that under this set of facts the action would fall squarely within Note 7 of *Gaubert*, 111 S.Ct. at 1275 and the discretionary function exception would not apply.

Given Baer's knowledge of the danger to which Andrulonis was being exposed there can be no possible argument that the failure to warn was a discretionary act subject to social, economic or political policy judgment. The rabies experiment was admittedly, "a low level research interest". J. App. 2213. There can be *no Gaubert* presumption because there is no regulatory framework to create the presumption. The warning, if given, would have no more than delayed the experiment for a short time, just as would a decision not to run the mythical stop light.

The effort to cloak Dr. Baer's actions with the dignity of being subject to policy analysis is an outrage and a sham. At best, they constituted plain ordinary garden variety negligence; realistically they were gross, almost criminal, negligence. If Dr. Baer's actions are protected by the discretionary function exception, then the exception may well be said to have swallowed the rule.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: April 24, 1992

Respectfully submitted,

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